Supreme Court, U.S.
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No. 90-857

In The

# Supreme Court of the United States

October Term, 1990

MARC GILBERT DOGGETT,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ Of Certiorari**
**To The United Stated Court Of Appeals**
**For The Eleventh Circuit**

## REPLY BRIEF FOR PETITIONER

Wm. J. Sheppard
Elizabeth L. White
Sheppard and White, P.A.
215 Washington Street
Jacksonville, Fl. 32202
(904) 356-9661

*Counsel for Petitioner*

July 15, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## ARGUMENT

### WHEN THE FOUR FACTORS SET FORTH IN *BARKER v. WINGO*, ARE BALANCED AS A WHOLE, PETITIONER IS ENTITLED TO DISMISSAL OF THE CHARGES AGAINST HIM.

In apparent recognition of the weakness of its position, the Government now seeks to change the facts that have been clearly established in this case. Findings of fact have been made, which are well supported by the record. These facts include a conclusive finding by both the district court and the Eleventh Circuit Court of Appeals that Mr. Doggett was not aware of the indictment pending against him. [J.A. 73, 107-108, Pet. App. 66]. The Government ignores these findings of fact, along with the undisputed fact that for approximately six years prior to his arrest Mr. Doggett lived openly and continuously in the community,[1] and instead, argues the existence of "circumstantial evidence" relative to his knowledge. It does so because it is well aware that the state of this record compels a finding that Mr. Doggett's right to a speedy trial has been violated.

Initially, the Government advances the meritless argument that the length of delay was not presumptively prejudicial. [Resp. Brief, 18-19]. It further argues that during the period between his indictment and arrest, Mr. Doggett was not subject to the "restraint, anxiety, and embarrassment that the speedy trial clause was designed

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[1] This fact alone certainly belies the Government's assertion that petitioner failed to present any "direct evidence" that he did not know of the indictment against him. [Resp. Brief, 6].

to minimize." [Resp. Brief, 19]. On this reasoning, it concludes, "[t]he eight-year period between indictment and arrest did not implicate any of the core concerns of the clause, [and] the length of the delay does not justify dismissal of the indictment." [Resp. Brief, 19]. The respondent's reasoning demonstrates its misunderstanding of the "length of the delay" analysis delineated by this Court in *Barker v. Wingo*, 407 U.S. 514, 530-31 (1972).

In *Barker*, this Court held, "The length of the delay is to some extent a triggering mechanism." 407 U.S. at 530. It reasoned that whether a delay was prejudicial is necessarily dependent upon the particular circumstances of a given case. *Id.* In referring to the circumstances of a case, this Court looked to the issue of whether the Government was justified in delaying a prosecution. Under *Barker*, the factors of prejudice and likely harm to the defendant are to be considered separately from the length of delay analysis. Thus, the Government incorrectly confuses length of delay with harm to the defendant by the delay.

As the Eleventh Circuit Court of Appeals noted below, "The Government . . . *conceded* that the length of delay is presumptively prejudicial." [Pet. App. 79] (Emphasis added). The Government now attempts to revoke what it conceded below. The Government also argues that *United States v. MacDonald*, 456 U.S. 1 (1982), lends support to its position that the length of delay in this case was not presumptively prejudicial. This Court granted certiorari in *MacDonald* to resolve, "[w]hether the time between dismissal of military charges and a subsequent indictment on civilian criminal charges should be considered in determining whether the delay in bringing respondent to trial for the murder of his wife and two



children violated his rights under the Speedy Trial Clause of the Sixth Amendment." *Id.* at 3. This Court found in *MacDonald* that the dismissal of military charges removed any restraint on the defendant's liberty, any disruption of his employment, any strain on his financial resources, exposure to public obloquy, and that the stress and anxiety present were no greater than that faced by the subject of any criminal investigation. *Id.* at 9. This Court concluded that the petitioner was "legally and constitutionally in the same posture *as though no charges had been made*" during the intervening period between dismissal of the military charges and initiation of civilian criminal charges. *Id.* at 10 (Emphasis added). Accordingly, this Court held that the intervening period at issue should not be considered in the length of delay analysis.

The *MacDonald* case clearly differs from that before this Court in that Mr. Doggett was under an indictment during the approximate eight and one-half year period between indictment and arrest. This Court long ago resolved that the period between indictment and arrest must be considered in evaluating a speedy trial clause claim. *Dillingham v. United States*, 423 U.S. 64, 65 (1975). Thus, none of the cases cited by the Government support its contention that the extraordinary delay between Mr. Doggett's indictment and arrest was not presumptively prejudicial.

The Government also cites *United States v. Loud Hawk*, 474 U.S. 302 (1986), for the proposition that the extraordinary delay in this case should be "disregarded, or at least significantly discounted, in the speedy trial calculus." [Resp. Brief, 17]. In *Loud Hawk*, this Court dealt with the

question of whether time during which the defendants were neither under indictment nor subject to any official restraint, and time which accrued due to delays occasioned by interlocutory appeals, should be considered within the length of delay prong of the speedy trial analysis. The defendants in *Loud Hawk* were arrested on November 14, 1975, and indicted by a federal grand jury on November 25, 1975. *Id.*, at 305-06.

Subsequently, the grand jury returned a superseding indictment against the defendants on December 22, 1975. *Id.* at 306. The district court then granted a motion to suppress and the Government appealed the suppression order. It also moved that the trial be continued on all counts pending the outcome of the appeal. *Id.* at 307. The district court subsequently dismissed the indictment with prejudice pursuant to Fed.R.Crim.P. 48(b), because the Government was not ready when the case was called for trial. *Id.* The Government immediately appealed the dismissal and the two appeals were consolidated. *Id.* at 307-08. The court of appeals then reversed the suppression order and held dismissal of the charges had been improper. *Id.* at 308.

Upon remand and issuance of a new indictment, the defendants filed voluminous motions including a motion alleging vindictive prosecution. *Id.* at 308-09. The latter motion resulted in yet another dismissal of the prosecution, a result thereafter reversed by the court of appeals. *Id.* at 30. When the case was returned to the district court, it dismissed the indictment on speedy trial grounds. *Id.* It was in this procedural posture that *Loud Hawk* was presented to this Court.



Relying on the *MacDonald* decision, this Court in *Loud Hawk* held that because the defendants were neither under indictment nor subject to any substantial restrictions on their liberty, that the period of time pending appeal of the initial dismissal should not be considered under the "length of delay" prong of the speedy trial analysis. *Id.* at 312. Significantly, this Court further found that a ninety month delay caused by interlocutory appeals brought by both the defendant and the Government was "presumptively prejudicial . . . and serve[d] to trigger application of *Barker*'s other factors." *Id.* at 314. This Court calculated the ninety month delay due to interlocutory appeals in its length of delay calculus because the defendants had been subject to indictment or restraint during that period. *Id.* at 312.

It therefore left no doubt that indictment serves to trigger commencement of the speedy trial clock. In this case, Mr. Doggett was unquestionably under indictment during the entire eight and one-half year span in question. Thus, the Government's attempted revocation of its prior concession that this time period was presumptively prejudicial and its attempt to assert that this period should not have triggered the *Barker* analysis, are both wholly unfounded.

The Government contends that the reason for the delay prong of the *Barker* analysis should not weigh against it because:

> The Speedy Trial Clause should not serve as a standing invitation to courts to second guess agency decisions regarding the utility and cost of techniques used to locate fugitives. Accordingly, the absence of a defendant ordinarily

> should be considered a valid reason for delay without the need for close and critical scrutiny of the techniques the government used to find him.

[Resp. Brief, 20] (footnote omitted). It argues that the magistrate in this case erred in "second guessing" the Government's assessment of the expense, burden, and value of the various investigative techniques. [Resp. Brief, 20, n.15]. An examination of the magistrate's analysis reveals that he justifiably was baffled by the ease with which state agencies use technological means to gather information, while agencies of the federal government appear to be floundering in ineptness and unsophistication. [Tr. 253-56]. He specifically questioned whether one government agency could be held accountable for the ineptness of another agency when rendering his decision. [Tr. 253].

He ultimately concluded that the Government failed to locate Mr. Doggett subsequent to his release from Panamanian custody due to a "breakdown in communication between government agencies." [Pet. App., 33-34]. He further concluded that, "[t]he failure to apprehend Doggett upon his release from Panama could be attributed to nothing more than *'bureaucratic negligence.'* " [Pet. App., 35] (Emphasis added). In a revealing footnote the magistrate stated:

> The Court does not have sufficient facts to establish whether or not the DEA's failure to discover Doggett's release was the direct result of the State Department or its own negligence. This raises an interesting question as to whether or not the negligence of another agency can be



> attributed to the law enforcement agency seeking the apprehension of the fugitive. Valid arguments could be made for each side. It could be argued that although the delay did not emanate from the direct action by the law enforcement officers, it should be nonetheless chargeable to the government because it results from a breakdown in the system that inevitably results in delay. On the other hand, it could be argued that errors made by helping agencies should not be chargeable if there was a reasonable good faith belief the helping agency was conducting a proper investigation. Otherwise, the agency responsible for the search would be held accountable to conduct every conceivable type of nationwide hunt.

[Pet. App., 35, n.10]. He concluded that the delay in arresting the petitioner was due to "negligence and was not intentionally done for tactical reasons. . . . " [Pet. App., 40]. Likewise, the Eleventh Circuit Court of Appeals found that, "[t]he Government's efforts to apprehend Doggett were negligent. . . . " [Pet. App. 85].

With these facts clearly established, the Government incredulously misstates a number of facts in an attempt to establish due diligence. For example, it contends:

> The record rebuts petitioner's assertion that the government should have used driver's license and credit checks to find petitioner. Agent Driver and a representative of the United States Marshals Service testified at the hearing that those techniques are burdensome and generally ineffective. J.A. 38-42, 52; Tr. 149, 160-162.

[Respondent's Brief, 23]. In fact, Agent Driver did not testify for the Government that it was truly "burdensome" or "ineffective" to run driver's license and computer checks. Rather,

he merely testified that it took a certain level of expertise to run such a check and that he did not "have the time to do that routinely and regularly." [J.A. 39-40].

Nowhere in the record is there any testimony to indicate that such a procedure is ineffective. The Government contends that because it was generally unsuccessful in apprehending fugitives sought in the program that resulted in the Petitioner's arrest, such techniques are ineffective. [Respondent's Brief, 23]. This contention is meaningless since there is no indication what the status of most of these individuals was, such as whether they were foreign nationals or were intentionally avoiding prosecution. Contrary to the Government's assertion, it is neither difficult nor time consuming to run a credit check on any individual. The ease with which the Government located the petitioner at the residence where he had been living openly for six years is the best evidence of this fact. It is undisputed that the Government located Mr. Doggett within thirty minutes utilizing this technique. [J.A. 94-95].

The Government would also have this Court ignore the undisputed fact that the agent in charge of the petitioner's apprehension submitted a series of false reports over a three-year period which reflected that the petitioner remained incarcerated in Panama based solely on the agent's erroneous "assumption". [J.A. 57-63, 73, 84, 89-90; Pet. App. 70-71]. The Government argues that Mr. Doggett be held accountable for his actions but does not want to be held accountable for its own ineptness and incompetence – or perhaps worse.

It also argues:

> Petitioner's mother cooperated with the police; she told them that drugs were ruining her son and that she had tried to have him arrested before. She promised that she would advise the officers when petitioner returned home. In light of Mrs. Doggett's cooperative attitude and firm promise of future assistance, Agent Driver reasonably believed that if petitioner returned to North Carolina, he would hear about it.



[Respondent's Brief, 21]. Additionally, it contends, "Whether or not petitioner communicated with [alleged co-conspirators] following their arrests, *it is difficult to believe* that neither petitioner's family nor his associates in the drug trade told him about their arrests." [Respondent's Brief, 25]. (Emphasis added). What the Government "believes" is irrelevant. The facts are as they are. They cannot be changed to suit the Government. This record establishes that the "reason for delay" prong of the *Barker* analysis should be weighted heavily against the Government.

The Government also argues that the assertion of right prong of the *Barker* analysis should weigh against Mr. Doggett. It would have this Court believe that, among other thing, Mr. Doggett was aware of the charges pending against him prior to his arrest. It alleges, "At the hearing on the motion to dismiss the indictment, however, the government presented strong circumstantial evidence that petitioner was aware of the indictment, and petitioner did not introduce any direct evidence to the contrary." [Respondent's Brief, 10]. The facts adduced below simply do not bear out this contention. The Eleventh Circuit Court of Appeals held that Mr. Doggett had no knowledge of the outstanding indictment prior to his arrest. [Pet. App. 73-74, 89]. For this reason, it found that the assertion of right prong in the *Barker* analysis was a neutral factor in weighing the petitioner's speedy trial claim.

Now, however, the Government argues that this Court should reconsider the facts of this case and find that Mr. Doggett was aware of the pending indictment and failed to assert his right to speedy trial until such time as he was arrested. [Resp. Brief, 24-26]. The Eleventh Circuit Court of Appeals correctly adopted the lower court's factual finding that the petitioner was unaware of the pending indictment prior to his arrest. [Pet. App. 86-91]. This finding cannot now be disturbed. Since Mr. Doggett in no fashion waived his right to a speedy trial or otherwise failed to assert it, this factor weighs in his favor.

With respect to this factor, the Government essentially wants it both ways. If an indicted individual is unaware of the indictment against him, he has no right to a speedy trial because he suffers no anxiety due to that pretrial delay. [Resp. Brief, 13]. Conversely, it argues, "Of course, if petitioner was aware of the charges against him, his constitutional claim would be very weak because of his failure to come forward and request a speedy trial." [Resp. Brief at 13, n.9]. Under either scenario, the Government argues no right to a speedy trial exists, a result clearly contrary to this Court's decisions in *Barker* and *Moore v. Arizona*, 414 U.S. 25 (1973). Indeed, it would appear that the only beneficiaries of such a rule would be individuals incarcerated on one charge and facing other charges during incarceration. Such analysis would render the sixth amendment right to a speedy trial meaningless.

In relation to the "prejudice" prong of the *Barker* analysis, the Government contends, but none too clearly, that Mr. Doggett was not prejudiced by the inexcusable delay in this case. While correctly conceding that prejudice has never been a requirement of this Court, the



Government nonetheless contends that Mr. Doggett must establish actual prejudice. [Resp. Brief, 28-29] A showing of actual prejudice has remained but one factor to be examined.

The Government contends that Mr. Doggett was not prejudiced by the disappearance of seventeen tape recordings and the unavailability of one potential witness, arguing, "[i]t is far more likely that the missing items would have confirmed petitioner's guilt." [Resp. Brief, 30]. This reasoning is purely speculative. Recent trials such as that of Washington, D.C. Mayor Marion Barry serve to remind us that tapes can be a two-edged sword; they can serve to hinder a prosecution as well as help it. Not knowing what was on the tapes in this case makes it impossible to determine the extent of prejudice suffered by Mr. Doggett. It is for this reason that he has urged the adoption of a "bright-line" rule.

The proposed rule would place the burden upon the Government to prove an individual who was not aware of a pending indictment, has not been prejudiced by a delayed prosecution whenever an amount of time equal to the statute of limitations has passed between indictment and arrest. Since the Government has acknowledged in its brief that the sixth amendment and the statute of limitations are the primary mechanisms which protect individuals from prejudice, [Resp. Brief, 2], it is difficult to understand its objection to adoption of such a rule. Moreover, adoption of the rule would in no way benefit those who knowingly evade arrest, but would instead ensure the swift administration of justice.

The Government's argument that Mr. Doggett somehow benefited from the delay in this case is ludicrous. During the time in question, Mr. Doggett worked diligently to educate himself, provide for his family and

become a productive member of society. [J.A. 99-113; Pet. App. 14-15]. His efforts have now been impaired by his felony conviction. The benefits to his life as the result of his efforts are his own, and are in no way attributable to the Government. Speculation as to what sentence Mr. Doggett would have received ten years ago serves no useful purpose here and, indeed, ignores the reality that Mr. Doggett could just as easily have been acquitted as convicted.

Finally, citing *United States v. Broce*, 488 U.S. 563, 569 (1989) as authority, the Government asserts, "By pleading guilty to the conspiracy charge, petitioner has admitted every element of the offense and disclaimed any possible assertion of actual innocence." [Resp. Brief at 30]. This blanket assertion is erroneous for two reasons. First, *Broce* does not stand for the broad proposition asserted by the Government and has no applicability to the facts of this case. Second, and perhaps more significantly, the Government's argument ignores the express provisions of Fed.R.Crim.P. 11(a)(2), under which petitioner entered a conditional plea in order to preserve his speedy trial claim for appellate review.

In *Broce*, pursuant to plea agreements the defendants entered outright pleas of guilty (as opposed to conditional pleas) to two indictments alleging conspiracies to commit Sherman Act violations. Specifically, by their pleas they admitted that they entered into an agreement on or about April, 1978 to rig bids on a certain highway project. *Id.* at 565-566. They also admitted to the same course of conduct in July of 1979, with respect to a different project. No appeal was ever taken and the judgments became final. *Id.* at 566. Thereafter, they sought to



vacate their sentences, as to the second indictment, on the grounds that such sentences violated the double jeopardy clause of the fifth amendment. Following lengthy appellate and remand proceedings, the Tenth Circuit Court of Appeals ultimately held that the defendants' guilty pleas did not constitute waivers of their double jeopardy rights[2] and that, because only a single conspiracy existed, defendants' sentences as to the second indictment should be vacated.

Addressing *only* the defendants' double jeopardy claim, this Court held that where a guilty plea is entered voluntarily with advice of counsel and "*has become final,*" collateral attack of that plea is foreclosed. *Id.* at 569 (Emphasis added).This Court specifically noted that the defendants had the opportunity prior to their plea "to challenge the theory of the indictments" but had failed to do so. *Id.* at 571. It therefore held defendants should not have been given the opportunity to mount a collateral attack on their sentences. *Id.* at 572.

Simply put, *Broce* further defined this Court's rule that guilty pleas may not be collaterally attacked if they are voluntarily and intelligently entered and made with the advice of competent counsel. *Broce* has absolutely no application where a defendant has entered a conditional

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[2] In *Ricketts v. Adamson*, 483 U.S. 1 (1987), this Court had previously held that double jeopardy claims are subject to the waiver doctrine.

plea pursuant to Fed.R.Crim.P. 11(a)(2), for the purpose of preserving a dispositive issue for appellate review.

Indeed, an examination of Fed.R.Crim.P. 11(a)(2), clearly forecloses the Government's assertion that Mr. Doggett has in some fashion "disclaimed" his right to challenge the lengthy delay in his prosecution or otherwise waived his right to assert his speedy trial claims. Under the terms of that rule, a conditional plea may be entered only, "[w]ith the approval of the court *and consent of the government* . . . " (Emphasis added). The parties would not presently be before this Court if the required governmental consent had not been given. [J.A. 114; Pet. App. 65].

More significantly, however, the Government has ignored the express language of Fed.R.Crim.P. 11(a)(2), which states, "A defendant who prevails on appeal *shall* be allowed to withdraw the plea." (Emphasis added). Thus, petitioner has "admitted" nothing except that he has avoided, " . . . the necessity for [a] trial . . . which [is] . . . undertaken for the sole purpose of preserving pretrial objections. . . . " *See* Notes of Conference Committee on 1975 Amendments to Rules (House Report No. 94-414). The judgment herein is in no sense final and the *Broce* decision has absolutely no application to this case. Any other interpretation of Fed.R.Crim.P. 11(a)(2) would render it meaningless and serve only to encourage unnecessary trials, an interpretation clearly contrary to its express terms. For this reason, the Government's "interpretation of Mr. Doggett's plea should be rejected by this Court.



## CONCLUSION

The Government has misstated the factual record before this Court. It has done so because the facts compel a finding that the first three factors of the speedy trial analysis were met by Mr. Doggett.

Additionally, the Government has conceded that, where the first three factors of the speedy trial analysis have been met, a showing of actual prejudice has not been required by this Court. For this reason, the opinion below should be reversed.

Respectfully submitted,

WM. J. SHEPPARD
(Counsel of Record)
ELIZABETH L. WHITE
SHEPPARD AND WHITE, P.A.
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661

*Attorneys for Petitioner*

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